No. 14588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ADOLPH G. SUTRO,
Appellee,

ADOLPH G. SUTRO,
Cross-Appellant,

vs.

UNITED STATES OF AMERICA,
Cross-Appellee.

REPLY BRIEF OF CROSS-APPELLANT

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SUMMARY OF ARGUMENT

1. Plaintiff is entitled to recover damages for the increased cost of all buildings to be erected on his property, as well as the domestic water and sewerage systems, irrigation system, fencing, tools and machinery. Plaintiff's losses in that regard were proximately caused by defendant's admittedly wrongful acts; his intention to make the improvements is clearly established in the record; the amount of his loss as to some improvements is in the record, and the amount of his loss as to other improvements can be accurately shown if the case is remanded for that purpose.

2. Plaintiff is entitled to damages for loss of use of his land based on not less than 100 acres of irrigable crop land prior to 1950 and 150 acres of irrigable crop land after 1950. The testi-

mony of the defendant's expert witness must be completely rejected, and an award should be made in an amount between $58,876.36 and $55,376.36 for loss of use of the land, based upon the only acceptable evidence in the record.

3. Plaintiff should have been permitted to present evidence as to his expenditures, in order that the court could determine which expenditures were properly made in mitigation of damages, and so that plaintiff could be awarded damages for the amount of such expenditures.

I.

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES EQUAL TO THE INCREASED COST OF ALL IMPROVEMENTS

A. PLAINTIFF WAS DAMAGED IN AN AMOUNT EQUAL TO THE INCREASED COST OF IMPROVEMENTS AS THE PROXIMATE RESULT OF DEFENDANT'S ADMITTED WRONGDOING.

In its answering brief as appellee, defendant argues that it should not be required to compensate Mr. Sutro for any of his loss arising out of the increase in building and other costs between 1946 and 1952 because, it says, its admittedly wrongful acts did not proximately cause that loss. Defendant bases a major portion of its argument on the proposition that it did not prevent Mr. Sutro from proceeding with construction in 1946.

True, the Government did not physically seize possession of the property and dispossess him. It did not post sentries around the property to keep Mr. Sutro from entering upon it. It was a physical possibility for Mr. Sutro to build in accordance

with his plans, but no more than a mere physical possibility.

Defendant's pollution of the stream and well made illegal the type of farming operation which would otherwise have been the highest and best use of the land. That illegality made not only useless but foolish any investment in the type of irrigation system and farm equipment which otherwise would have been necessary to obtain a reasonable return from a farming operation of the type upon which Mr. Sutro intended to embark. Without the ranch in operation, and without the buildings which would otherwise have been built, Mr. Sutro had little use and no space for machinery and tools which he otherwise would have bought and used.

Defendant's pollution of the stream and well deprived Mr. Sutro of any source of water for domestic purposes. Without water on the land for drinking, cooking, bathing and washing, life on the land, even if not physically impossible, would be difficult indeed. Defendant apparently believes Mr. Sutro should have built his home relying exclusively on bottled water for all those purposes. Even if the Health Department would have permitted such a course of action (which it certainly would not), the very thought of working or living on a sewer farm would have made it almost impossible to obtain qualified help, and precautions which would have been necessary to protect the health of workers on the ranch would have been so costly and burdensome as to make operation all but impossible.

In short, defendant's wrongful pollution of the stream and well directly and immediately interfered with and prevented plaintiff from constructing the planned buildings on his ranch, installing the water, irrigation and sewerage systems, and purchasing machinery and tools. The damages sustained by plaintiff flowed as directly from the defendant's tort as did the sewage from its plant.

B. THE EVIDENCE SHOWING THAT PLAINTIFF INTENDED IN 1946 TO MAKE ALL IMPROVEMENTS AS TO WHICH DAMAGES ARE CLAIMED IS CLEAR AND CONVINCING.

1. *No written memorandum is necessary for establishment of plaintiff's right to recovery.*

As to certain improvements, including the domestic water and sewerage systems, irrigation system, fencing, farm equipment and tools, defendant raises a second argument. Defendant says it is not responsible for Mr. Sutro's losses in connection with those items because he failed in 1946 to make a written memorandum of his intention to construct or purchase the items listed. Defendant seems to think the Statute of Frauds somehow applies to this case. Certainly there is no legal necessity for a writing in such a case as this, and in fact the existence of a written memorandum relative to some of the items would be most unusual and surprising. Who ever made a blueprint before constructing a simple farm fence?

The only requirement of evidence in this case should be that it establish Mr. Sutro's 1946 intention with a reasonable degree of certainty. That requirement, we submit, was met. An examination of the evidence regarding each item leaves little room for doubting that it would have been built or bought long ago but for the defendant's tortious conduct.

2. *Recovery should be allowed for increased cost of the domestic water system.*

The 1946 plans include a residence, a guest house, and a help house. The plans for each building indicate inside plumb-

ing, without which permits for construction could not be obtained, and without which the buildings would be practically unuseable. While no detailed plans were drawn in 1946, it is obvious that some sort of pressure tank, heater, piping and drain would be necessary. The plan submitted at the time of trial shows a system of modest size, which is exactly what would be expected in connection with such buildings. Supported by Mr. Sutro's testimony that it is substantially what he intended in 1946 when the buildings were designed, its rejection seems extremely arbitrary.

3. *Recovery should be allowed for increased cost of the sewerage system.*

The same applies to the sewerage system. While defendant for years apparently regarded adequate sewerage as unnecessary, and only since the judgment of the District Court was rendered herein has finally conceded that its conduct in this connection was wrongful, most people have at all times been more fastidious. Plans for the various ranch buildings show inside bathrooms. Soil pipes and septic tanks were therefore a necessity, and of course were intended in 1946. The cost estimate submitted by Mr. Burlake was based on the *minimum* requirements of the San Diego County Health Department (R. p. 504). It certainly cannot be contended that Mr. Sutro planned or should have planned a cheaper system than that.

4. *Recovery should be allowed for increased cost of fencing.*

No plan for the fencing was prepared in 1946, but who would make a careful advance plan of an ordinary farm fence? All ranches in the area are fenced, and inside fencing was nec-

essary because a portion of the land was to be used as pasture, while the balance was to be planted in crops. The cost estimate submitted is for a perfectly ordinary type of farm fence, of materials generally used in the region and no speculation is involved in computing the cost. To deny all recovery for increased cost of fencing merely because no *exact plan* was made in 1946 places form above substance.

5. *Recovery should be allowed for increased cost of constructing the irrigation system in its entirety.*

The irrigation system falls into the same category. The ranch could not be operated without an irrigation system. Mr. Tedford, of the Soil Conservation Service, testified that Mr. Sutro discussed his plan for the system with him in 1945 and 1946, and letters to pump manufacturers written during those years are in evidence. The system is now almost complete, and was built in accordance with the plans in evidence. It should be noted that the pumps to be used with the system are much smaller and less expensive than those ordinarily used to water such a large acreage, because Mr. Sutro's system calls for pumping water 24 hours a day into reservoirs, from which it is released in large quantities only during the day. There is no room for question. Mr. Sutro intended in 1946 to build the system substantially as shown in those plans. We repeat the suggestion made in the note at page 26 of our former brief that if the Court has any doubt upon this point, it may remand the case to the District Court to take evidence establishing that the system has now actually been installed in accordance with these plans.

6. Recovery should be allowed for increased cost of tools and machinery.

The plan for the shop building shows the location and approximate size of each tool. The only detail not shown is the brand. The brands used for estimating cost are medium grade, neither deluxe nor shoddy. They are what would be bought by a person thinking of both price and quality, and they are in general what Mr. Sutro intended to buy in 1946. Should he be made to bear the burden of defendant's wrong completely without compensation because he did not enter the one additional item of brand names on the shop drawing made in 1946?

Likewise, no list of farm machinery was prepared in 1946, but the list now submitted is for the minimum amount of machinery required for operation of a sizeable farming enterprise.

Regarding costs of all of these items, the first question should be (a) was it intended in 1946, and (b) if so, what was the increase in cost. There can be no doubt that all those items were intended in 1946. The increased cost of most items is in evidence, and the increased costs of the other items can be established easily if this case is remanded to the District Court for that purpose. All of those increased costs should be allowed to plaintiff as damages.

C. PLAINTIFF'S KNOWLEDGE IN 1946 OF DEFENDANT'S WRONGDOING AS TO THE STREAM DOES NOT DEFEAT PLAINTIFF'S RIGHT OF RECOVERY.

Defendant argues that Mr. Sutro may not be entitled to damages because at the time he bought the ranch he knew that the stream was polluted. The stream had in fact been polluted

for several weeks. This evidence is uncontradicted, and defendant does not deny that. Mr. Sutro did not know that the *well* was also polluted. Moreover, plaintiff had no reason to anticipate that the stream would remain polluted for a half dozen years. On the contrary, he was entitled to presume that the defendant would obey the law and cease and desist from polluting the stream. No physical impediment existed. Defendant could have stopped the pollution in 1946 as easily as it in fact stopped the pollution in 1952. It just did not choose to do so. Mr. Sutro was repeatedly assured by high-ranking Government officials that the pollution was a very temporary matter. It now ill becomes the United States Government to argue that because in 1946 it had erred for a brief time, a citizen was bound to anticipate that its wrongful conduct would continue unabated for years to come.

Defendant declares it cannot see the importance of pollution of the well. The importance is obvious. Believing that the water in the well was pure, Mr. Sutro actually commenced construction of the buildings, and if the well had not been polluted, he could have commenced irrigated farming in 1946. (See footnote, pp. 13 and 14, plaintiff's former brief.) The well is of large capacity, and is capable of supplying all domestic needs as well as irrigating a large crop acreage. Throughout this proceeding, from the time the original complaint was filed, plaintiff has based his case not only on the pollution of the stream but also on the pollution of the well, which, of course, resulted directly from the defendant's wrongful dumping of sewage into the watershed (See, for example, complaint, pars. IV and V, R. pp. 9-11). If either the well or the stream had been pure, Mr. Sutro's damage would have been limited to loss of use of only a portion of the farm land, and there would have been no loss at all as to buildings and improvements. Statements in defendant's answering

brief indicating that this action is based solely upon pollution of the stream are utterly without foundation in the record.

II.

THE DISTRICT COURT'S AWARD WITH RESPECT TO LOSS OF RENTAL VALUE WAS INADEQUATE

A. THE DISTRICT COURT ERRED IN ACCEPTING TESTIMONY ON LOSS OF RENTAL VALUE GIVEN BY DEFENDANT'S EXPERT.

It is true, as defendant says, that plaintiff does not question the basic qualifications of Mr. Goode, the appraiser defendant imported from Santa Ana. However, as is shown in plaintiff's opening brief, Mr. Goode's preparation for this particular appraisal was grossly inept. His ignorance of local conditions, his failure to consider crucial factors, and his almost total reliance on wholly irrelevant facts deprive his testimony of all value.

While Mr. Sutro testified under the well established rule that a landowner can express an opinion regarding his own property, rather than as an expert, his preparation for the appraisal was actually far superior to that of Mr. Goode, and his analysis would have done credit to a professional appraiser.

Mr. Anderson, plaintiff's appraiser, was eminently qualified and was familiar with local conditions. He had handled sales and leases of many pieces of property in the region. He, too, considered the factors which directly bear on rental value, and his opinion should not have been lightly dismissed.

B. THE DISTRICT COURT ERRED IN REFUSING TO ALLOW DAMAGES FOR LOSS OF RENTAL VALUE OF AN ADDITIONAL FIFTY ACRES AFTER 1950.

In its argument on rent, defendant repeats the inexplicable error mentioned above by declaring that plaintiff's recovery for loss of use must be limited to land which can be watered with stream water. Plaintiff never intended to irrigate solely with stream water. He intended to use both stream and well water, and the existing irrigation system is so designed. Throughout this case, plaintiff has claimed damages for the combined result of pollution of the stream and the well.

Defendant likewise errs when it summarily rejects plaintiff's claim for loss of use of fifty acres which could have been watered from the new well drilled by Mr. Sutro in 1950 in an attempt to find a pure water supply. That well exists. It has been thoroughly tested and its pumping capacity and cost are in the record. Those figures clearly establish that it will produce enough water to irrigate fifty acres, even when the other well is pumped to capacity. That evidence is undisputed. It is equally undisputed that the new well was polluted by defendant and so could not be used for domestic use or ordinary irrigation purposes. Mr. Sutro was therefore deprived of the value of the land which that well was capable of irrigating. He had both the land and the water. The only impediment was the pollution wrongfully and needlessly caused by defendant, and for that defendant should pay.

C. THE DISTRICT COURT ERRED IN BASING ITS AWARD FOR LOSS OF USE OF ALKALIZED LAND ON ITS VALUE AS PASTURE INSTEAD OF CROP LAND.

Defendant argues that the court gave adequate damages for

loss of use of eighteen acres of alkalized land because it allowed $10 per acre, based on use of the alkalized land as pasture. Defendant misses the point that since the eighteen acres would not have been alkalized but for defendant's wrongful act of silting Pilgrim Creek, and since the land can be and now is being reclaimed, that land should have been treated in the award as irrigable crop land, not pasture. Defendant seeks to take advantage of its own wrong when it argues that damages should be allowed only on the basis of loss of use as pasture.

D. THE DISTRICT COURT'S MATHEMATICAL ERROR IN CALCULATING DAMAGES SHOULD BE CORRECTED.

Defendant argues that the court's obvious mathematical error in computing the deduction from loss of rental value should go uncorrected because Mr. Goode imagined possible uses for that land with polluted water which would have permitted even larger deduction. Without going into the merit, or lack of merit, of Mr. Goode's suggestions, it seems clearly improper to convert a mathematical error into a finding of fact. Even if it were conceded that the court could have deducted a larger amount without any explanation, the fact remains that the court did explain to a degree the process by which it reached its result, and the exact dollars and cents figure arrived at by the court can be explained only as being the result of a mathematical error, as is demonstrated in plaintiff's opening brief, pages 49 and 50. It would be a serious injustice to permit that error to go uncorrected.

III.

PLAINTIFF SHOULD BE PERMITTED TO PRESENT EVIDENCE CONCERNING HIS EXPENDITURES TO MITIGATE DAMAGES

Defendant seeks to justify exclusion of all evidence concerning Mr. Sutro's efforts to mitigate damages on the grounds that the evidence would be immaterial and speculative. It is submitted that efforts to preserve the land from erosion, which would have been wholly unnecessary but for defendant's tort, expenses of storage of equipment which would have otherwise been kept in buildings constructed on the ranch and used in ranch operation, and expenses of travel to meetings called by Navy officials to discuss ways and means of correcting the situation all bear a very direct relationship to defendant's tort, and should have been considered.

Defendant does not deny that its agent, the Public Works Office of the Eleventh Naval District, advised Mr. Sutro that he was legally obligated to mitigate damages. Instead, defendant picks the phrase "no permanent benefit" out of plaintiff's "Specifications of Error" and seeks to create the impression that lack of permanent benefit is the sole reason given by plaintiff for recovery of his expenditures. That phrase does not even appear in plaintiff's argument. It is, of course, a condition of recovery, but not a reason for recovery.

As is shown in plaintiff's opening brief, many, if not all, of the expenditures were made reasonably and in good faith to prevent greater damage from occurring than did in fact occur. The expenditures would not have been necessary but for defendant's wrongdoing, they were far less in amount than the harm foreseeable if they were not made; and they were in fact suggested

by defendant's own agent. Incidentally, they resulted in no permanent benefit except to the degree they minimized the harm done by defendant's tortious conduct. The court should have permitted plaintiff to show how much was spent and for what it was spent in order that it could determine exactly which expenditures should be recovered in this action. Exclusion of evidence as to all expenditures merely because some might not be recoverable is indeed harsh and unjust.

IV.

ATTORNEYS' FEES

Section 2678 of Title 26 U. S. Code provides that "The court rendering a judgment for the plaintiff pursuant to Section 1346 (b) of this title . . . may, as a part of such judgment . . . determine and allow reasonable attorneys' fees which . . . shall not exceed . . . 20 per centum of the amount recovered under Section 1346 (b) of this title, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant."

Pursuant to the provision of this section the District Court ordered that plaintiff's attorneys be allowed 20% of the judgment awarded to the plaintiff, namely, the sum of $6,384.27 to be paid to said attorneys out of the judgment for $31,921.37. (Judgment, R. page 48.)

If this Court either increases or decreases the amount of the award to plaintiff, it is requested that in the light of the foregoing statute this Court should indicate the effect of any change made by it in the judgment to plaintiff upon the fees to be paid to plaintiff's attorneys, particularly in view of the concluding portion of said Section 2678 which prohibits an attorney from accepting any compensation in addition to that allowed by the court under said section.

CONCLUSION

Defendant's admitted wrongdoing over a period of many years was the proximate cause of injury to plaintiff for which under the laws of California he is entitled to compensation. No amount of money can make plaintiff completely whole, but the relief granted by the District Court is totally inadequate to compensate plaintiff for even that portion of his injury which can be repaired by an award of money. The judgment of that Court must be reversed and on the basis of evidence already in the record, plaintiff should be awarded damages of $59,876.36 for loss of rental value of the property, instead of the $18,918.36 allowed by the District Court; and damages of $70,969.00 for increase cost of improvements as to which evidence was actually admitted, instead of $13,003.03 as allowed by the District Court. The case should be remanded to the District Court with directions to receive evidence as to the increased cost of those improvements as to which the District Court has refused to receive evidence, and as to plaintiff's expenditures in an effort to mitigate damages, and to enter judgment for the plaintiff for the amount necessary to compensate plaintiff for the increased cost of such items and for the amounts necessarily and reasonably expended in the effort to mitigate damages.

Respectfully submitted,

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